No. _____

IN THE

Supreme Court of the United States

October Term, 1943

J. J. BOWMAN and JAMES S. BOWMAN, d.b.a. BOWMAN REALTY COMPANY,

Petitioners,

v.

CHESTER BOWLES, Price Administrator,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Refer to "Statement of Jurisdiction" hereinbefore set forth, at page 6.

II

STATEMENT OF THE CASE

Refer to "Summary and Statement of the Matter Involved," hereinabove set forth, at page 2, and "Questions Presented and Reasons Relied Upon for Allowance of Writ," hereinbefore set forth, at page 7.

III

ERRORS OF COURT BELOW

Refer to "Questions Presented and Reasons Relied Upon for Allowance of Writ," hereinbefore set forth, at page 7.

IV

ARGUMENT

(a)

PETITIONERS ARE ENTITLED TO A RULING CONSTRUING THE HOUSING REGULATIONS AS PERMITTING A VARIABLE AND SLIDING SCALE OF RENTALS

Petitioners contend that if the Administrator properly denied their election to register within the Hotel Regulation, the Administrator—and in his default, the Emergency Court of Appeals—should have granted alternative relief to Petitioners by construing the Housing Regulation as permitting a sliding scale of rents.

The Emergency Court of Appeals refused to consider Petitioners' Application for alternative relief for the reason that the point "with regard to the construction of the Housing Regulation was not raised in the Protest proceedings with sufficient clarity to have required the Administrator's consideration and ruling," and consequently the Emergency Court of Appeals accepted "the Administrator's interpretation of the Housing Regulation as not permitting a sliding scale of rents" (Emergency Court of Appeals Opinion, pages 3 and 4; Transcript of Record, page 76v77).

It is submitted that this alternative relief from the institution of the proceedings has been the essence of Petitioners' prayed for relief. In the original Order of the Area Rent Director, issued March 19, 1943 (Transcript of Proceedings before the Price Administrator, page 43; Transcript of Record, page 43), the Director found:

"The Director therefore finds that the provisions of the Maximum Rent Regulations for Hotels and Rooming Houses are not better adapted to the rental practices for said building than are the provisions of the Maximum Rent Regulations for Housing Accommodations other than Hotels and Rooming Houses, but finds that the provisions of the Maximum Rent Regulations for Housing Accommodations other than Hotels and Rooming Houses are better adapted to the rental practices for such building and establishment. The Director therefore refuses to consent to the landlord's election." (Election to register under Hotel Regulation.)

It was from this Order that the Application for Review and then the Protest were taken (Protest was filed July 31, 1943, and denied by the Administrator September 1, 1943). At all times the question has been not which Regulations (Housing Regulation or Hotel Regulation) was better designed for Petitioners' Accommodations, but whether this variable or sliding rental practice could be maintained. It is, and always has been, immaterial to Petitioners which Regulation they are subjected to, if the practice of variable and sliding scale of rents could be maintained. This is patently evident in all the proceedings. It should be further pointed out that the Protest against the Area Rent Director's Order and the Administrator's refusal to permit the registration under the Hotel Regulation, was in itself an alternative relief requested by Petitioners, for they at first sought to register under the Housing Regulations, which had been denied by the Area Rent Office, with the suggestion by the Chief Rent Attorney that recourse be had to the Hotel Regulation. The Chief Rent Attorney said, in part (Transcript of Proceedings before the Price Administrator, page 21; Transcript of Record, page 27).

> "Your only recourse, as I see it, is an election by you to come within the Hotel and Rooming House Regulations. The landlord who so elects shall file a registration statement under the Hotel and Rooming House Regulations accompanied by a written request to the director to consent to such election. . . ."

Further, a Memorandum was filed contemporaneously with the Protest to the Administrator (Transcript of Record, page 70), which was entitled "Memorandum In Support of Owners' Registration of Variable Rent Schedule," which pointed out to the Administrator that the relief desired by Petitioners was to secure the consent of the Administrator to their variable rent schedule. That Memorandum is replete in its argument for the variable rent schedule, as is the Protest; and the Administrator's opinion clearly evidences that the matter involved was Petitioners' variable rent schedule, and not under which of the Regulations Petitioners could be registered properly.

And lastly, the Emergency Court of Appeals itself held, in its decision in the within cause, that it was the duty of the Administrator to decide which of the two Regulations is better adapted to the practices for Petitioners' building (Emergency Court of Appeals Opinion, page 6; Transcript of Record, page 77). The Court said:

> "When an election is made under this section, it is the obvious duty of the Administrator, in order to be able to determine whether he should consent to the election, to ascertain the rental practices for the building. Upon ascertaining this factual situation, it then becomes his duty to decide which of the two Regulations is better adapted to the practices for the building. In reviewing this procedure, this Court must follow the same course. . . ."

The Court then denied Petitioners the alternative relief prayed for, to wit, a construction of the Housing Regula-

tions as permitting a variable and sliding scale of rentals, because, the Court said, the question was not raised with sufficient clarity, in the face of its ruling that it was the duty of the Administrator, and its duty, to determine the question of the variable and sliding scale of rentals, even though it were not raised!

It is submitted, therefore, that the Emergency Court of Appeals erred in holding that the alternative relief specifically requested of the Emergency Court of Appeals was not raised with sufficient clarity to have required the Administrator's consideration. The fact is that it was the only consideration before the Administrator and the Emergency Court of Appeals hereinabove set forth.

(b)

THE EMERGENCY COURT OF APPEALS ERRED IN HOLDING THE GENERAL AVERMENTS OF THE COMPLAINT, THAT PETITIONERS HAD A LONG AND CONTINUED PRACTICE OF RENTING UNITS ON A VARIABLE OR SLIDING SCALE OF RENTS, WERE UNSUPPORTED BY EVIDENCE [MEANING "NO EVIDENCE"]

In Petitioners' Complaint, the following is set forth:

> "Complainants say further that they elected to register said property under the Rent Regulation for Hotels and Rooming Houses because of the aforementioned advices, and because of the following, to-wit:
>
> "(1) Approximately ten years' operation under a variable or sliding scale of rents, as determined by the term of occupancy and the number of occupants.
>
> "(2) Approximately ten years' operation as an apartment hotel, during which period said property was in direct competition with other apartment hotels in the City of Cincinnati.
>
> "(3) Approximately ten years' operation, during which period all of the units in the said property have been offered as furnished apartments.

"(4) Approximately ten years' operation, during which period accommodations for transient guests have been at all times available.

"(5) Approximately ten years' operation, during which period there have been offered, and available to guests, standard apartment hotel services.

"(6) That other properties, similar to, or exactly like, said property, in Cincinnati and elsewhere, are considered apartment hotels, and are registered, if at all, under the Rent Regulation for Hotels and Rooming Houses."

The identical allegations were made before the Administrator, and not an iota of evidence was before him to indicate the contrary. In fact, a verified statement (Transcript of Proceedings before the Price Administrator, page 8; Transcript of Record, page 8) of one of the Petitioners stated: "Affiant further says that the controversy in this matter relates to the business practice of long standing in the Rosedale Apartments of charging variable rents, depending upon the term of tenancy and the number of occupants, and asks that the attached memorandum be made and considered a part hereof."

The evidentiary processes here ceased, because the Office of Price Administration itself admitted the existence of and the long standing nature of Petitioners' practice of variable or sliding scale of rentals.

If, and only if, admissions of the responding party—here the Office of Price Administration—may not be considered in support of the claims and contentions of the opposite party, is the finding of the Emergency Court of Appeals supportable; if admissions of the responding party are "no evidence," then the Court's finding is supportable.

This proposition is, of course, patently unsound. *What is admitted need not be otherwise evidenced.*

Here then is the evidence supporting the general averments as to Petitioners' variable or sliding scale rental practices.

On February 10, 1943 (after the controversy had arisen and after the registration had been submitted under the Housing Regulation) the Chief Rent Attorney in the Office of the Area Rent Director, Cincinnati, Ohio, wrote to Mr. J. J. Bowman (one of Petitioners) as follows (Transcript of Proceedings before the Price Administrator, pages 20-21; Transcript of Record, page 20):

"OFFICE OF AREA RENT DIRECTOR,

"126 East Fourth Street, Cincinnati, Ohio,

"Parkway 0100, February 10, 1943.

"Bowman Realty Company,

"3547 Rosedale Place, Cincinnati, Ohio

"Dear Mr. Bowman: You own an apartment building. *At all times prior to March 1, 1942, you have maintained a varying schedule of charges based upon term of occupancy and based upon number of occupants.* For example, you have a weekly rate of $45 per week, monthly rate of $150 per month, semipermanent (or six months) rate of $100 a month and a permanent (or yearly occupancy) on a basis of $85 per month. In addition there is a $10 charge per month for each occupant in excess of three. All of your other furnished apartments have rates based upon weekly, monthly, six months or yearly occupancy; also there is additional charge for occupants on all of your other apartments although the additional charge in some cases is for occupants in excess of two and some in excess of four. In some apartments you also have extra charge for garage. *You want to maintain the same schedule of charges.* You state that in your business it is *necessary to have different rates depending upon terms of occupancy and number of occupants, because it is a much more expensive proposition when the person stays on a temporary basis only.* You are required to do more cleaning and refurnishing of the apartment. Also, more occupants usually result in harder wear and tear upon the furniture. The tenants who occupied the various apartments on March 1 may

have been in on weekly, mont y, semipermanently, or yearly basis and, therefore, if no provision may be made for different terms of occupancy or for additional occupants your maximum legal rent might in some cases be high because the person who occupied was on a weekly basis or lower in other cases because the occupant was on so-called permanent basis. (Italics Petitioners.')

Here then is the Office of Price Administration itself finding, as a matter of fact, that the practice was of long standing, and then currently being maintained by Petitioners. How is it possible, then, for the Emergency Court of Appeals to find that no facts are shown in support of Complainants' claim?

What was the legal or evidentiary necessity for further evidence, when the Office of Price Administration itself had unqualifiedly admitted that the practice existed and was then currently being maintained!

It is submitted, therefore, that the Emergency Court of Appeals erred in holding that the general averments of the Complaint in reference to the long and continued practice of renting units on a variable or sliding scale of rentals, were unsupported by evidence.

(c)

THE EMERGENCY COURT OF APPEALS ERRED IN HOLDING THAT THE AVERMENTS OF THE COMPLAINT, NOT ADMITTED NOR SPECIFICALLY DENIED BY THE ADMINISTRATOR, ARE INSUFFICIENT TO OVERCOME THE PRESUMPTION OF LAW THAT THE ADMINISTRATOR'S DECISION WAS PROPER

It should be observed at this point that the Administrator's answer was filed after the Transcript of the Proceedings Before the Price Administrator had been prepared, and therefore it must be indisputably presumed that it was

made with the knowledge of what that Transcript contained. The Transcript contained, as hereinabove set forth in IV (b) specific admissions of the Chief Rent Attorney of the Office of the Area Rent Director, in Cincinnati, that Petitioners had a long-continued, and were then currently maintaining, the practice of variable and sliding scale rentals. So, when the Administrator came on to answer, there was prepared a detailed and meticulously responsive answer, specifically admitting and denying the various averments of the Complaint. In view of the fact that the variable or sliding scale was the nub of the whole controversy, it is highly significant that in the detailed, responsive and specific answer, no denial was made by the Administrator of Petitioners' long and continued practice in reference to variable and sliding scales. Is it not patently obvious, then, in view of the fact that it was the nub of the whole controversy, and in view of the fact that the Office of Price Administration had specifically admitted the maintenance of the practice in the past and in the present, that the Administrator did not intend to deny, nor did he actually, deny, in his answer, the maintenance of the practice?

Therefore, the Emergency Court of Appeals erred in going into the adjective question and dismissing Petitioners' Complaint for what erroneously appeared to the Court to be a defect in the pleadings.

In any event, however, even though the adjective questions, *on the pleadings alone*, were properly decided, it is certainly apparent that because of the evidence [IV (b)], the question was quite improperly taken under consideration by the Emergency Court.

CONCLUSION

The real question before the Administrator, and before the Emergency Court of Appeals, was whether Petitioners may properly maintain their variable or sliding scale of rentals. It is submitted that the Emergency Court of Appeals subverted the intention of the parties to determine whether or not Petitioners may properly maintain the variable or sliding scale of rents by first refusing to consider alternative relief by finding that it was not requested of the Administrator with sufficient clarity, and further by holding that there was no evidence to support the averments of the Complaint when in fact the averments had been unequivocally admitted all through the proceedings.

WHEREFORE, Petitioners pray for the allowance of their writ, and for such other and further relief to which they may be entitled in the premises.

Respectfully submitted,

PAUL W. STEER,
Attorney for Petitioners.

Dated Cincinnati, Ohio, April 3, 1944.